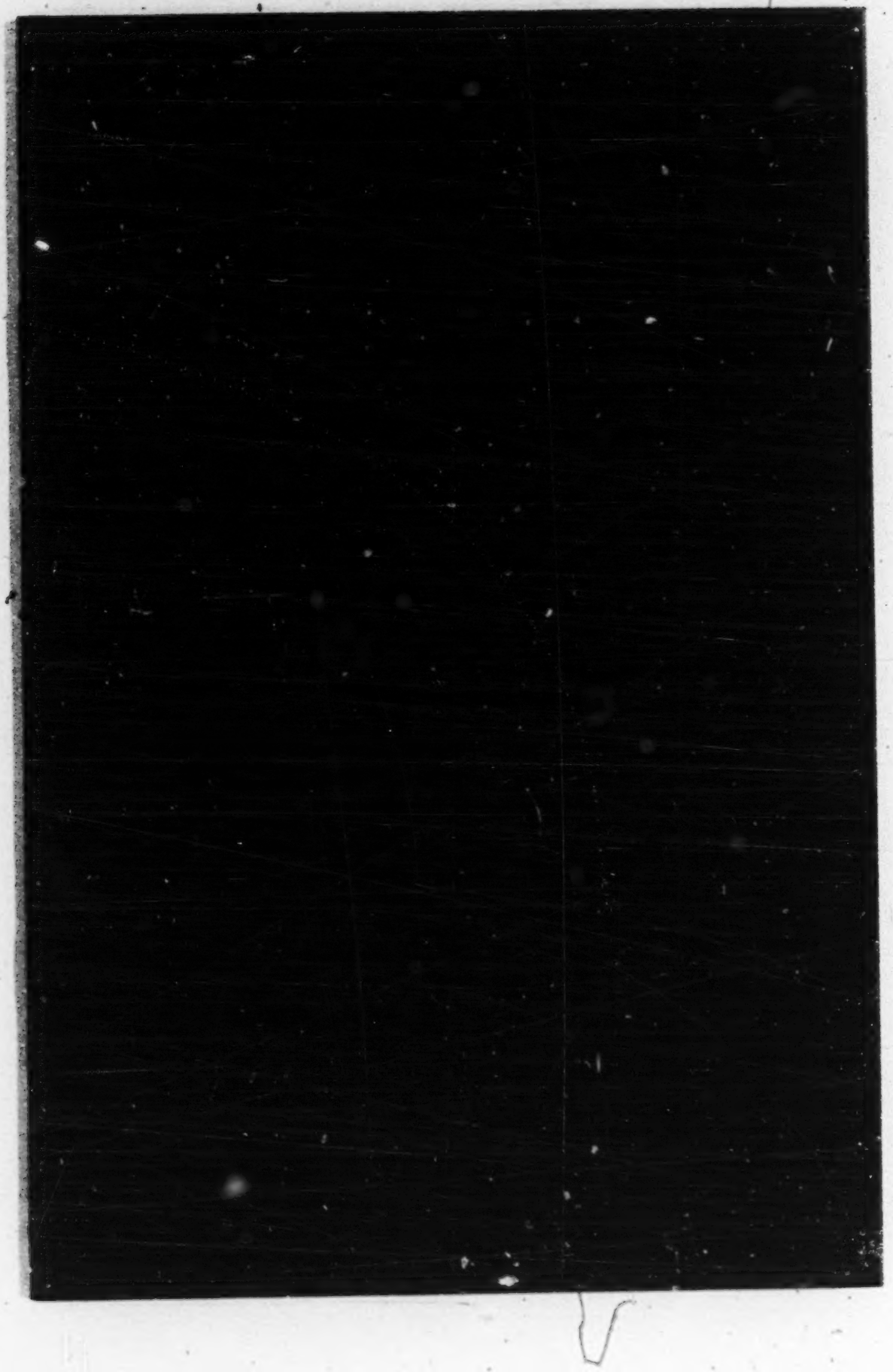

Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES, PETITIONER

vs.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

[fol. 1] • • • •

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DANIEL J. KOENIG

MOTION TO SUPPRESS EVIDENCE AND RETURN PROPERTY—
Filed October 12, 1959

COMES Now the Defendant, DANIEL KOENIG, by and through his undersigned attorneys, and respectfully moves this Court to suppress the evidence seized by the Federal Bureau of Investigation, United States Department of Justice, on the night of September 29, 1959 from his, Koenig's, residence located at 1015 N. W. 76th Street, Miami, Dade County, Florida, which said location is within the Miami Division of the Southern District of Florida, and which said location is within the jurisdiction of this Federal District Court, and further moves this Court to return the property seized on the said date from the said address and to suppress and return any other property seized from his, Koenig's, automobile, garage or from any other place or thing belonging to the said Koenig; that in support of this Motion the following is alleged:

I

That the instant Motion is proper and that this Court has jurisdiction to entertain the same under the 4th Amendment of the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure.

II

That on the night of September 29, 1959, agents of the Federal Bureau of Investigation, United States Depart-
[fol. 3] ment of Justice entered his, Koenig's, residence located at 1015 N.W. 76th Street, Miami, Dade County, Florida without color of a search warrant.

III

That at the time, date and place aforementioned the Defendant, in response to a knock at his front door, answered the same and was "greeted" by a number of United States officials belonging to the Federal Bureau of Investigation, United States Department of Justice and immediately informed that he was under arrest and immediately placed in handcuffs, all this taking place at the Defendant's front door.

IV

That simultaneously, a number of United States officials belonging to the Federal Bureau of Investigation, United States Department of Justice entered his, Koenig's, residence from both the front and rear doors and proceeded to search the entire seven room house, the entire curtilage and that pursuant thereto certain personal properties including currency of the United States, papers and clothing was seized illegally.

V

That the said Defendant was arrested as above described without color of an arrest warrant but apparently arrested on information that a Complaint was being filed or had been filed earlier that date in Steubenville, Ohio.

[fol. 4]

VI

That in furtherance of this unreasonable search and seizure the said agents proceeded to search the automobile of the Defendant which said automobile was located several city blocks away from the residence of the Defendant.

VII

That the Defendant is without actual knowledge as to what personal property was seized throughout all of these unreasonable searches as no inventory was ever made to him but does know from statements made by various of the said agents to him and allegedly made by the said agents to the newspapers that monies, papers, weapons and clothing were seized, all of the same not being found on his person or within his immediate possession at the time of his unlawful arrest.

VIII

That the said arrest was unlawful because it was without an arrest warrant; the said arrest was not based on facts known to the said agents perfecting the arrest which gave them grounds to reasonably believe that the said Defendant had committed a felony or was committing a felony; that the said arrest, if perfected upon information that a Complaint had been filed out of the District, was still unlawful as the said Complaint failed to allege sufficient facts upon which a lawful arrest warrant could issue.

[fol. 5]

IX

That no night time (or day) search warrant was ever obtained for the Defendant's person, house, garage or automobile by the said agents.

X

That at no time was consent ever given by the Defendant to the said agents to search his person, house, garage or automobile.

Because of the aforesaid, the Defendant respectfully moves this Court to suppress all the evidence seized by these said agents and return of the said property seized from his person, house, garage and/or automobile.

Respectfully submitted,

/s/ Jos. P. Manners
Jos. P. Manners
311 Industrial National Bank Building
Miami 32, Florida

and

/s/ Harold P. Barkas
Harold P. Barkas
DuPont Building, Suite 1425
Miami, Florida

[fol. 6] Certification of Service Omitted in Printing

[fol. 9]

IN UNITED STATES DISTRICT COURT

REMOVAL PROCEEDINGS:

REPORT AND RECOMMENDATIONS—Filed October 14, 1959

To the Judges of the District Court of the United States for the Southern District of Florida:

The defendant, DANIEL J. KOENIG, was arrested on September 29, 1959, by Special Agent, Charles A. Hardison, of the Federal Bureau of Investigation on the basis of an outstanding Warrant of Arrest issued by a United States Commissioner for the Southern District of Ohio, Eastern Division, following a complaint charging DANIEL J. KOENIG with taking approximately $38,000.00 from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Ohio, by force, violence and intimidation, as will appear from the copy of the Complaint and Warrant filed herewith in violation of Title 18, Section 2113 (a) and (d) U. S. Code. Final hearing was held on October 9, 1959.

EVIDENCE:

In support of the application for removal the Government produced the following witnesses:

Special Agent Charles A. Hardison, Federal Bureau of Investigation, who testified that he arrested the defendant, DANIEL J. KOENIG, at Miami, Florida, and found in [fol. 10] his possession approximately $14,000.00 in currency and a .45 Caliber Colt Automatic.

Cally Bragalone, an employee of the Bank who witnessed the robbery and the taking of approximately $38,000.00, and identified the accused as participating therein and the possession by the robber of a gun similar in appearance to the gun found in the possession of the accused.

Charles D. Eisenhower, a customer of the Bank who witnessed the robbery, had a gun placed in his side by one of the robbers and was made to walk to a vault, who

identified the accused as participating in the robbery and the gun used as similar to the gun found in the possession of the accused.

FINDINGS:

I, therefore, find that probable cause exist to believe the accused to be the person named in the Complaint and Warrant, and that the robbery by force, violence and intimidation took place as alleged in the Complaint and that the accused participated therein.

RECOMMENDATION:

IT IS THEREFORE, recommended that:

(a) A Warrant of Removal of the accused, DANIEL J. KOENIG, to the Southern District of Ohio, be entered herein.

[fol. 11] Respectfully submitted,

ROGER EDWARD DAVIS
U. S. Commissioner
Southern District of Florida
Miami Division

Complaint and Warrant is filed herewith.

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 13]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMMISSIONER'S WARRANT OF ARREST

To Any Authorized United States Officer:

You are hereby commanded to arrest (here insert name of defendant or description) Daniel J. Koenig, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with (here describe offense charged in complaint) taking from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Jefferson County, Ohio, by force, violence and intimidation money in the amount of about $38,000.00 which money was at that time in the custody, control and possession of said Bank; and, in so doing placed the life of said Cashier in jeopardy by use of a gun in violation of U.S.C. Title, 18, Section 2113 (a) and (d).

Date September 29, 1959.

/s/ Joseph Freedman
United States Commissioner

1. Here insert designation of officer to whom warrant is issued.

RETURN

Received 10-2-59, 1959 at Miami, Fla. and executed by arrest of Daniel J. Koenig at Miami, Fla. on Sept. 29, 1959.

/s/ Charles A. Hardison Name
Special Agent, F.B.I. Title
Southern District of Florida

Date Oct. 2, 1959

By Deputy

[fol. 15]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 2113 (a), (d)

BEFORE (Name of Commissioner) Joseph Freedman.
(Address of Commissioner) Steubenville, Ohio

The undersigned complainant being duly sworn states:

That on or about August 22, 1959, at Yorkville, Belmont County in the Southern District of Ohio, (name of accused) Daniel J. Koenig did (here insert statement of the essential facts constituting the offense charged) with accomplice by force and violence and intimidation take from the person and presence of another approximately

$38,000.00 belonging to and in the care, custody, control, management and possession of a bank, to wit, the Community Savings Bank, at Yorkville, Ohio; the deposits of which are insured by the Federal Deposit Insurance Corporation; further, Daniel J. Koenig entered said Bank armed with a pistol and ordered Thomas C. Icenhower, Mrs. Cally Bragalone and other customers and employees of said Bank to enter the vault while his accomplice took from the bank cashier of said bank the aforementioned sum of money;

And the complainant further states that that Thomas C. Icenhower and Mrs. Cally Bragalone who were present at the above described bank robbery have identified photographs of Daniel J. Koenig, defendant herein, as being one of the bank robbers and on October 9, 1959 personally identified him as such robber, and are material witnesses in relation to this charge.

/s/ Robert R. Rockwell
Signature of Complainant
Special Agent, F.B.I.
Official Title, "if any"

Sworn to before me, and subscribed in my presence, October 13, 1959.

/s/ Joseph Freedman
United States Commissioner

[fol. 17]

IN UNITED STATES DISTRICT COURT

REMOVAL PROCEEDINGS:

REPORT AND RECOMMENDATIONS—Filed November 4, 1959

To the Judges of the District Court of the United States for the Southern District of Florida:

The defendant, DANIEL J. KOENIG, was arrested on October 19, 1959, upon a warrant based upon an indictment returned in the District Court of the United States for the Southern District of Ohio, Eastern Division.

Removal hearing was held before the undersigned United States Commissioner on November 2, 1959.

EVIDENCE:

The Government introduced a certified copy of indictment Criminal No. 7558 returned on October 16, 1959, which alleged an offense against the laws of the United States of America within the jurisdiction of the District Court of the United States for the Southern District of Ohio.

Special Agent Robert R. Rockwell of the Federal Bureau of Investigation, testified that he appeared before the Grand Jury returning the aforesaid indictment on October 16, 1959, and testified concerning his investigation of the offense alleged and exhibited to the Grand Jurors [fol. 18] a picture bearing a likeness to the accused, which is attached to this report marked Government's Exhibit "A". This picture he had shown to Bank employees who testified it has the likeness of one of the persons who held up the Community Savings Bank Company of Yorkville, Ohio.

Cally Bragalone, an employee of the Bank identified the accused as one of the persons who held up the Bank. She did not appear before the Grand Jury.

FINDINGS:

I find that the evidence introduced by the Government is sufficient to establish probable cause for the removal of the defendant.

RECOMMENDATION:

IT IS, THEREFORE, recommended that:

(a) An Order be entered herein removing the defendant, DANIEL J. KOENIG, to the Southern District of Ohio, Eastern Division.

Respectfully submitted,

ROGER EDWARD DAVIS
U. S. Commissioner
Southern District of Florida
Miami Division

[fol. 19] Warrant for Arrest of Defendant, Government's Exhibit "A", and Certified copy of Indictment are filed herewith.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing REPORT AND RECOMMENDATIONS was delivered to LLOYD G. BATES, JR., Assistant United States Attorney, Attorney for Plaintiff, and JOSEPH P. MANNERS, Attorney for Defendant, 311 Industrial National Bank Building, Miami, Florida, on November 4, 1959.

ROGER EDWARD DAVIS

[fol. 27]

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA
v.
DANIEL J. KOENIG

WARRANT OF ARREST

To Any Authorized United States Officer:

You are hereby commanded to arrest (here insert name of defendant or description) Daniel J. Koenig, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with (here describe offense charged in complaint) accomplice by force and violence and intimidation take from the person and presence of another about $38,000 belonging to and in the care, custody, control and management of a bank, to wit, the Community Savings Bank, at Yorkville, Ohio; the deposits of which are insured by the Federal Deposit Insurance Corporation; and that said robbery occurred on or about the 22nd day of August, 1959 in violation of U.S.C. Title, 18, Section 2113 (a) and (d).

Date October 13, 1959.

/s/ Joseph Freedman
United States Commissioner

1. Here insert designation of officer to whom warrant is issued.

RETURN

Received October 16, 1959 at Miami, Fla., and executed by arrest of Daniel J. Koenig at Miami, Fla. on October 16, 1959.

THOS. H. TRENT — Name
U.S. Marshal — Title
Southern District of Florida

Date October 16, 1959.

By /s/ Charles G. Traband, Deputy
CHAS. G. TRABAND

[fol. 29]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Commissioner's Docket No. 2
Case No. 57

UNITED STATES OF AMERICA

v.

DANIEL J. KOENIG

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 2113 (a) and (d)

BEFORE (Name of Commissioner) Joseph Freedman.
(Address of Commissioner) Steubenville, Ohio

The undersigned complainant being duly sworn states:

That on or about August 22, 1959, at Yorkville, Jefferson County in the Southern District of Ohio, (name of accused) Daniel J. Koenig did (here insert statement of the essential facts constituting the offense charged) take from John Olszowy, Cashier of The Community Savings Bank Company of Yorkville, Jefferson County, Ohio, by force, violence and intimation money in the amount of about $38,000.00 which money was at that time in the custody, control and possession of said bank; and, in committing this offense, placed in jeopardy the life of said John Olszowy, Cashier, by the use of a dangerous weapon, to wit, a gun;

And the complainant further states that he believes that
are material witnesses in relation to this charge.

/s/ Glenn L. McAvoy
Signature of Complainant
Special Agent, F.B.I.
Official Title, "if any"

Sworn to before me, and subscribed in my presence, September 29, 1959.

/s/ Joseph Freedman
United States Commissioner

[fol. 33]

IN UNITED STATES DISTRICT COURT

Motion to Stay Return of Property—
Filed November 25, 1959

The Aetna Casualty & Surety Company moves the Court to stay the return of property, to wit: money described in the motion to suppress evidence and return property filed herein by Daniel J. Koenig. And for grounds thereof says as follows:

1. Aetna Casualty & Surety Company is a Connecticut corporation, with its principal place of business in Hartford, Connecticut, and is licensed to do business in the State of Florida.

2. On August 22, 1959, and at all times material hereto, the Community Savings Bank of Yorkville, Ohio, was insured by Aetna Casualty & Surety Company under provisions of an insurance bond issued in favor of the Community Savings Bank of Yorkville, Ohio, by Aetna Casualty & Surety Company.

3. Under the provisions of this insurance bond the Aetna Casualty & Surety Company agreed to indemnify and hold harmless the Community Savings Bank of Yorkville, Ohio, which includes, but is not limited to, loss through robbery, theft, or hold-up.

4. On August 22, 1959, by force of arms and threats of violence Daniel J. Koenig unlawfully took from the Community Savings Bank of Yorkville, Ohio, United [fol. 34] States currency belonging to the said Bank in the amount of $38,846.00.

5. By virtue of the loss sustained by the Community Savings Bank of Yorkville, Ohio, through the robbery, theft, or hold-up of the Community Savings Bank of Yorkville, Ohio, by Daniel J. Koenig on August 22, 1959, as set forth above, the Aetna Casualty & Surety Company, under the terms of the said insurance bond, paid to the Community Savings Bank of Yorkville, Ohio, the sum of $38,846.00, and therefore the Aetna Casualty & Surety Company became subrogated to the rights of the

Community Savings Bank of Yorkville, Ohio, to the said $38,846.00, or any part thereof.

6. On September 29, 1959, agents of the Federal Bureau of Investigation seized from the premises leased to Daniel J. Koenig at 1015 N.W. 76th Street, Miami, Florida, approximately $14,000.00 in United States currency.

7. The aforesaid money is part of the $38,846.00 which was unlawfully taken from the Community Savings Bank of Yorkville, Ohio, by Daniel J. Koenig and is the lawful property of the Community Savings Bank of Yorkville, Ohio, to whose rights in this money the Aetna Casualty & Surety Company is subrogated.

8. Daniel J. Koenig, by motion filed herein on October 12, 1959, seeks the return of the money seized on September 29, 1959.

9. The retention of the said money by the Court, or its duly appointed custodian, pending an adjudication of the rights thereto as between Aetna Casualty & Surety [fol. 35] Company and Daniel J. Koenig, is necessary to preserve the said money for delivery to its true owner.

WHEREFORE, the Aetna Casualty & Surety Company moves the Court to enter an order staying the return of the aforesaid money to Daniel J. Koenig, and directing the Court, or its duly appointed custodian, to retain possession thereof pending an adjudication, by a plenary proceeding, of the rights thereto as between Aetna Casualty & Surety Company and Daniel J. Koenig.

BLACKWELL, WALKER & GRAY,
Attorneys for Aetna Casualty & Surety Company,

By LOUIS L. LAFONTISEE, JR.
First Federal Building.
Miami 32, Florida

CERTIFICATE OF SERVICE OMITTED IN PRINTING

[fol. 36] • • • •

[fol. 37]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO SUPPRESS EVIDENCE—Dec. 18, 1959

THIS CAUSE came on to be heard upon the motions filed on behalf of the Defendant, DANIEL J. KOENIG, to suppress evidence and return to the Defendant certain property seized by the Federal Bureau of Investigation, an agency of the United States Government, in connection with the arrest of the Defendant and the search conducted in and about the premises of the Defendant's residence located at 1015 N.W. 76th Street, Miami, Dade County, Florida, on September 29, 1959.

Testimony was taken pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure and the Court heard argument of counsel for the respective parties. The Court, having considered the record, together with the exhibits, and the briefs submitted herein, is of the opinion that the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States. It is, therefore, upon consideration

ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Suppress Evidence be, and the same is hereby, granted and all evidence seized by the Federal Bureau of Investigation at 1015 N.W. 76th Street, Miami, Dade County, Florida, and from the automobile nearby on September 29, 1959, be, and the same is hereby, suppressed. It is further

ORDERED, ADJUDGED and DECREED that the Defendant's [fol. 38] Motion for Return of Property seized during the said search be, and the same is hereby, denied without prejudice to the Defendant's right to renew said motion in the trial court. It is further

ORDERED, ADJUDGED and DECREED that all property seized from the residence of the Defendant, at 1015 N.W. 76th Street, Miami, Florida, and from his automobile located nearby on September 29, 1959, shall remain in

the custody of the United States government officials and in due course be transmitted to the jurisdiction and authority of the District Court for the Southern District of Ohio for a final determination of the ownership or right of possession of the said property.

DONE and ORDERED in Chambers at Miami, Florida, this 18th day of December, A.D. 1959.

JOSEPH P. LIEB
United States District Judge

• • • •

[fol. 39] • • • •

[fol. 40]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Jan. 18, 1960

Comes now plaintiff, United States of America, and appeals to the Fifth Circuit from order entered herein on December 18, 1959.

E. COLEMAN MADSEN,
United States Attorney

by: /s/ Lloyd G. Bates, Jr.
LLOYD G. BATES, JR.,
Assistant U. S. Attorney
Attorneys for plaintiff
UNITED STATES OF AMERICA

THIS IS TO CERTIFY that true and correct copies of the foregoing were this 18th day of January, 1960, mailed to Joseph P. Manners and Harold P. Barkas, Esqs., Industrial National Bank Bldg., Miami, Florida, and Blackwell, Walker & Gray, Esqs., First Federal Building, Miami, Florida, attorneys for defendant.

/s/ Lloyd G. Bates, Jr.

[fols. 41-310] • • • •

[fol. 311] IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18355

UNITED STATES OF AMERICA, APPELLANT

versus

DANIEL J. KOENIG, APPELLEE

Appeal from the United States District Court for the Southern District of Florida

OPINION—April 12, 1961

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The scales of justice are not always evenly balanced; one of the scales holds a few extra weights in favor of a person accused of crime. This appeal deals with one of those weights: the limited jurisdiction of this Court to hear a government appeal [fol. 312] from an order of a district court suppressing evidence.[1] For purposes of the appeal, two elements in

[1] September 10, 1959, F.B.I. agents arrested Daniel J. Koenig in Miami, Florida, on a faulty arrest warrant and on probable cause based on a teletype communication from Ohio that a complaint had been filed against Koenig charging him with a bank robbery. After Koenig's arrest, agents searched the house he rented, his garage, and his automobile. They seized, among other things, an attache case containing $13,190, a 45 calibre blue steel Colt automatic, a masquerade make-up kit, a box containing forty coin-wrappers, two rolls of pennies with fifty pennies in each roll, and other articles including a black ceramic cat containing $340. Octcober 9, 1959, the United States Commissioner at Miami held a final hearing on the Ohio complaint. October 12 Koenig filed a motion in the District Court for the Southern District of Florida, under Rule 41(e), Fed. R. Crim. P., for the suppression of the seized property and for the return of the property. Two days later, the Commissioner filed his written findings and recommendation that a warrant of removal of Koenig be entered. October 16, four days after the motion to suppress was filed, an indictment was returned against Koenig in the Southern District of Ohio. December 18, 1959, after three hear-

the case are important. (1) The defendant filed his motion to suppress before he was indicted, but after a complaint was issued against him and after a commitment hearing before the United States Commissioner. (2) The suppression order was issued in a district different from the district in which the defendant was indicted and will be tried. We hold that the order is not appealable. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637, controls our decision.

Government appeals in criminal cases are exceptional and are not favored by the courts. *Carroll* v. *United* [fol. 313] *States*, 1957, 354 U.S. 394, 400, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. Such appeals must be based on express statutory authority; the government had no right of appeal at common law. *United States* v. *Sanges*, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445; *United States* v. *Janitz*, 3 Cir., 1947, 161 F.2d 19; *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015. See Orfield, Criminal Appeals in America, p. 58 (1939).

The primary statutory authority for government appeals in criminal cases, 18 U.S.C.A. 3731, does not specifically include appeals from orders suppressing evidence.[2]

---

ings on earlier dates, the district court in Florida granted Koenig's motion to suppress the evidence and denied the motion for return of the property. The court held that the F.B.I. agents had probable cause to make the arrest without a warrant, but that the search was unreasonable and violative of the Fourteenth Amendment. The Government appeals from that order denying the motion to suppress; the defendant has not appealed from denial of the motion for return of the property. We do not discuss the reasonableness of the search and seizure, because of our holding that the order is not appealable.

[2] "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances: From a decision of judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted." 18 U.S.C.A. § 3731.

The Judicial Code, however, does authorize appeals from "all *final* decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. § 1291. The appealability of an order suppressing evidence depends, therefore, upon whether it is "final".[3] [fol. 314] Orders in an incidental ancillary proceeding to a criminal action are interlocutory and non-appealable; orders in independent plenary proceedings are final and appealable. *United States* v. *Wallace & Tiernan Co.*, 1949, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042; *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Ponder*, 4 Cir., 1956, 238 F.2d 825. See 6 Moore, Federal Practice, ¶ 54.14.

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[3] In criminal cases a final judgment or order may be reviewed by way of immediate appeal or writ or error, but absent special statutory authorization an interlocutory order cannot be so reviewed. See 6 Moore, Federal Practice, ¶ 54.11, 54.12, 54.14, 54.16; 2 Am.Jur., Appeal & Error, § 21. The final judgment as a basis for appeal is an historic concept, the modern rationale of which is to prevent congestion in the appellate courts. See Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932). Crick suggests that upon analysis the "final judgment" rule causes as much labor as it saves, however, since it requires repeated litigation to determine what is and what is not a final judgment. Id. at 557-63. This case offers additional evidence to substantiate his thesis. Nevertheless the function of the rule is to avoid piecemeal litigation and the delays, caused by interlocutory appeals. See 6 Moore, Federal Practice, ¶ 54.11; Lewis v. E. I. DuPont de Nemours & Co., 5 Cir., 1950, 183 F.2d 29. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice." Mr. Justice Frankfurter in Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783.

The crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used.[4] If there is no criminal proceeding pending, a motion for suppression of evidence and the return of [fol. 315] such (evidential) property is an independent civil suit. But at what stage does a criminal proceeding begin? The courts of appeal have reached various answers.[5]

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[4] As Judge Tuttle states the test in Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 417, cert. den. 359 U.S. 935, the answer to the question whether an order to suppress evidence is final or interlocutory is found by determining whether the motion was made in "an independent civil proceeding, finally terminated with the order denying [or granting] the relief or is ancillary to a pending criminal proceeding." The time at which the motion was made, rather than the time at which it is passed upon by the court, controls in determining the character of the proceeding. Cogen v. United States, 278 U.S. 221, 49 St. Ct. 118, 73 L.Ed. 275; United States v. Poller, 2 Cir., 1930, 43 F.2d 911.

[5] *Second Circuit:* Cheng Wai v. United States, 2 Cir., 1942, 125 F. 2d 915 (before indictment, order appealable); United States v. Poller, 2 Cir., 1930, 43 F.2d 911 (after proceedings before commissioner, but before indictment; order appealable).

Third Circuit: United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873 (after indictment, order appealable; United States v. Pack, 3 Cir., 1957, 247 F.2d 168 (after indictment and dismissal, order not appealable); United States v. Bianco, 3 Cir., 1951, 189 F.2d 716 (before indictment, order appealable); United States v. Janitz, 3 Cir., 1947, 161 F.2d 19 (after indictment, order not appealable); Re Sana Laboratories, Inc., 3 Cir., 1940, 115 F.2d 717, cert. den. sub. nom. Sana Laboratories, Inc. v. United States, 1941, 312 U. S. 688 (after indictment, order appealable).

Fourth Circuit: United States v. Ponder, 4 Cir., 1956, 238 F.2d 825, noted in 35 No. Car. L. Rev. 501 (1957) (after indictment, order appealable); United States v. Williams, 4 Cir., 1955, 227 F.2d 149 (before indictment, order not appealable).

Fifth Circuit: Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935 (before indictment, order not appealable); United States v. Ashby, 5 Cir., 1957, 245 F.2d 684 (after indictment and dismissal, order appealable); Davis v. United States, 5 Cir., 1943, 138 F.2d 406 (hearing before Grand Jury, order appealable); Turner v. Camp, 5 Cir., 1941, 123 F.2d

[fol. 316] The filing of an information or an indictment is frequently accepted as the dividing-line to mark the beginning of criminal proceedings. See Orfield, Criminal Procedure from Arrest to Appeal, pp. 204-208 (1947). The difficulty here is that at the time Koenig filed his motion, there was no way of knowing positively that he would be indicted. In *Post* v. *United States*, 1894, 161 U.S. 583, 587, 16 S.Ct. 611, 40 L.Ed. 816, (not, however, involving a motion to suppress) the Supreme Court said:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. [citations omitted]. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the

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840 (summary proceeding against prosecuting officer, order appealable).

Sixth Circuit: Dowling v. Collins, 6 Cir., 1926, 10 F. 2d 62 (criminal case pending, order nevertheless appealable).

Seventh Circuit: United States v. One Plymouth Sedan Automobile, 7 Cir., 1948, 169 F.2d 3 (after indictment, order not appealable).

Ninth Circuit: United States v. Sugden, 9 Cir., 1955, 226 F.2d 281, aff'd mem., 1956, 351 U.S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir., 1952, 196 F.2d 874 (before indictment or information, after complaint, arrest, and arraignment; if order effective, appealable); Freeman v. United States, 9 Cir., 1946, 160 F.2d 69 (after complaint and hearing before Commissioner, but before indictment, order appealable); United States v. Rosenwasser, 9 Cir., 1944, 145 F.2d 1015 (after first trial, before new trial, order not appealable).

District of Columbia Circuit: United States v. Stephenson, D.C. Cir., 1955, 223 F.2d 336 (after indictment, order not appealable); Nelson v. United States, D.C. Cir., 1953, 208 F.2d 505, cert. den. 346 U.S. 827 (before indictment, order not appealable); United States v. Cefarvatti, D.C. Cir., 1952, 202 F.2d 13, noted in 21 Geo. Wash. L. Rev. 631, 39 Va. L. Rev. 103, 41 Geo. L. J. 259 (after indictment, order appealable). See Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 83-102 (1959); Note, 106 U. Pa. L. Rev. 612 (1958).

accused, but are merely to assist the grand jury in determining whether such proceedings shall be commended; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

When the motion to suppress is made *after* indictment the order is considered interlocutory and neither the defendant nor the government may appeal from it, be-[fol. 317] cause the question whether the accused would be indicted has been resolved and motions related to the suppression of evidence are integrally related to the criminal proceeding. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442 (government's right to appeal); *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (defendant's right to appeal). Orders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence. Even when the motion results in dismissal of the indictment for lack of evidence, the order is not final and hence not appealable. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. But where the motion is made by the applicant *before* an information or indictment is found or returned against him, some courts —and we recognize the force of their arguments—treat the proceeding as independent and the resulting order final and appealable. *Go-Bart Importing Co.* v. *United States*, 1931, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 344; *Burdeau* v. *McDowell*, 1920, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *Perlman* v. *United States*, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; *Davis* v. *United States*, 5 Cir., 1943, 138 F.2d 406; *Cheng Wai* v. *United States*, 2 Cir., 1942, 125 F.2d 915.

This Court has drawn the line at a stage earlier than indictment. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637. This Court treats an indictment, once made, as relating back, at least to the extent that when an indictment has been returned, an order to suppress, following on the heels of a complaint and a commitment hearing,

is treated as one step in a series of steps constituting [fol. 318] the criminal proceeding. In Zacarias the defendant's motion to suppress was filed and denied before indictment.[6] A complaint had been issued by a United States Commissioner, a commitment hearing had been held, and Zacarias was already bound over to the district court. This Court refused to allow an appeal by the defendant, on the ground that the order denying his motion was interlocutory. Koenig is in no different situation from Zacarias. Here, a complaint and a warrant had been issued, the Commissioner had held a full preliminary hearing, the Commissioner had announced oral findings recommending that Koenig be removed to the district court in the Southern District of Ohio, and the district court reached its decision on suppressing the evidence four months after Koenig had been under indictment. In the light of Zacarias, Koenig's motion to suppress was not an independent action but simply an early step in the criminal case against him.[7]

The fact that the motion for the return of property was denied, while the motion to suppress was granted, so that the property remains in the possession of the court, [fol. 319] adds some weight to the view that the order appealed from is interlocutory. Cf. *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015, 1017; *Carroll* v. *United States*, *supra* at p. 404, n. 17.

The Government seeks to distinguish Zacarias on the ground that the Zacarias appeal was from an order *deny-*

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[6] See also Saba v. United States, 5 Cir., 1960, 282 F.2d 255 and Peterson v. United States, 5 Cir., 1958, 260 F.2d 265, in which cases, however, the motion to suppress was filed after indictment. See United States v. Williams, 4 Cir., 1955, 227 F.2d 149, cited with approval in Zacarias.

[7] "However, we think it quite plain that after a complaint has been issued by a United States Commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute '[held] to answer in the district court,' a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable." Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 418.

ing a defendant's motion to suppress evidence: here, the appeal is from an order *granting* the motion. When there is a denial of the motion, the defendant still may object to the evidence when it is introduced in the trial and may appeal from a verdict against him. If, on the other hand, the motion to suppress is granted, the government cannot introduce the evidence, cannot appeal if it loses the case, and may be forever deprived of questioning the validity of the order. But on this score, the position of the government is no worse than in the usual case of an adverse ruling on a point of evidence during a criminal trial. There too the government would have no right of appeal. See *United States* v. *Rosenwasser*, 9 Cir., 1944, 245 F.2d 1015. There may be a difference between the grant and denial of a motion that works to the disadvantage of the government, but the effect of the difference cannot change the form and character of a motion as interlocutory or as final. *Carroll* v. *United States*, 1957, 354 U.S. 394, 404-06, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. This difference between granting and denying a suppression order does point up the imbalance in the scales of justice, but it is up to Congress to make the correction. See Kronenberg, The Right of a State to Appeal in Criminal Cases, 49 J. Crim. L., C. & P.S. 473 (1959); Comment, The Right of State Appeal in Criminal Cases, [fol. 320] 9 Rutgers L. Rev. 545 (1955); Orfield, Criminal Appeals in America, pp. 61-64 (1939).

The United States argues that the issuance of the order by a court in a different district from that in which the trial will occur takes the case out of the general rule and beyond the reach of Zacarias.[8] Rule 41(e), Fed. R.

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[8] In Carroll v. United States, 1957, 354 U.S. 394, 403, 77 S.Ct. 332, 1 L.Ed. 2d 1442, the Supreme Court stated: "Earlier cases illustrated, sometimes without discussion, that under certain conditions, orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur. . . ." Carroll dealt with the appealability of an order granting a motion to suppress made *after indictment and in the district of trial.* Thus the language quoted above was not essential to the disposition of the case. To support the statement, the Court cited, in a footnote, only the case of Dier

Crim. P. provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . . . The motion to suppress evidence may also be made in the district where the trial is to be had."

[fol. 321] There is nothing in this rule leading to the conclusion that if an order of suppression is rendered in the district of seizure it is necessarily "binding" in the district of trial, as the Government contends. Rule 41 (e) says nothing about the government's rights. Rule 41(e) may even be read to mean that the defendant has two bites at the apple, once in the district of seizure and once "also" in the district of trial. If Rule 41(e) is read as allowing a single hearing, rather than multiple hearings, there is still no language in the rule requiring that a suppression order be regarded as "final".

When we get down to the bare bones of the argument, we find the government contending that in the same district or circuit a pre-trial suppression order "binds" the trial judge and, a fortiori, the pre-trial suppression order of a district judge in Florida "binds" the district judge in Ohio charged with trying Koenig; therefore, the order

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v. Banton, 262 U.S. 147, 67 L.Ed. 915, 43 S.Ct. 533. In the Dier case the motion was made in federal court, but the criminal proceedings, if any, were to be brought in state court. The Receiver of the assets of an alleged bankrupt had in his possession the books and records of the bankrupt. Dier, the bankrupt, sought an injunction to prevent the Receiver from turning over these books and records to the District Attorney of New York County for use in a state grand jury proceeding on the ground that this would violate his constitutional privilege against self-incrimination. The lower court denied the motion. The Supreme Court heard the appeal without discussion of the issue of appealability. For several reasons, we consider the Dier case inapplicable to the instant case: the appeal was not by the government: the matter related only tangentially to a criminal case; and the motion possessed "sufficient independence from the main course of the prosecution to warrant treatment as [a] plenary order. . . " Carroll v. United States, *supra* at 403.

is final, and appealable. It is certainly proper that, generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other.[9] But, as we read the cases, this matter is essentially one within the sound discretion of a trial judge conducting his court in the interest of furthering the administration of justice.[10] [fol. 322] In this Circuit, in *United States* v. *Brewer*, 24 F.R.D. 129 (N.D.Ga., 1959), the District Court for the Northern District of Georgia held that the defendants

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[9] "In federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." Prack v. Weissenger, 4 Cir., 1960, 276 F.2d 446. See also Two Guys from Harrison-Allentown, Inc. v. McGinley, 3 Cir., 1959, 266 F.2d 427.

[10] The courts are in disagreement as to whether a ruling on a pre-trial motion to suppress is binding on the trial court. In United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, one district judge had denied a pre-trial suppression order, and a second judge, taking new testimony, had granted the order. The Court of Appeals held that it was a proper exercise of discretion to take new testimony, but an abuse of discretion to grant the order where the testimony was essentially the same as at the original hearing. The decision was based on the third circuit rule that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (TCF Flms v. Gourley, 3 Cir., 1957, 240 F.2d 711, 713). The rule is "designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, 748. The second Circuit took the opposite view in Dictograph v. Sonotone, 2 Cir., 1956, 230 F.2d 131 (not however involving Rule 41(e)): "[J]udicial sensibilities should play no part in suitors' rights." But see United States v. Klapholz, 2 Cir., 1956, 230 F.2d 494. In Waldron v. United States, D.C. Cir., 1955, 219 F.2d 37, 41, the court held: "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during the trial." Citing Waldron in a case where a motion to suppress was denied before trial and renewed at trial, Judge Holtzoff held that "a ruling denying a motion to suppress made before the trial under Rule 41(e) . . . becomes the law of the case and is binding on the trial court". United States v. Jennings, 1956, 19 F.R.D. 311, aff'd 247 F.2d 784. But see United States v. Jackson, 1957, 149 F. Supp. 937, rev'd on other ground, 250 F.2d 772.

could not bring motions to suppress evidence in the district of trial when the motions had been brought and denied in the district of seizure, the Middle District of Georgia. The Court stated that Rule 41(e) "is intended to provide for a hearing in either district, but does not require multiple hearings"; that "in the absence of exceptional circumstances" the ruling in the district of seizure is controlling. In *United States* v. *Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957) the district court in New York held that a defendant, moving for suppression of evidence could not, as a matter of right, invoke the jurisdiction of the court of seizure. The court declined jurisdiction, leaving the defendant free to move for suppression in the district court of trial in Pennsylvania. "Such a course", the Second Circuit pointed out in *United States* v. *Klap-*
[fol. 323] *holz*, 1956, 230 F.2d 494, 497, "would have avoided invasion of the trial court's normal province to pass on the admissibility of evidence without jeopardy to the right of the defendants to the exclusion of evidence under the McNabb rule." In Klapholz the motion to suppress was based on Rule 5(a), Fed. R. Crim. P. There is no doubt, however, that a federal court has jurisdiction to entertain a motion to suppress evidence obtained within the district even though the offenses were committed in another district, and violated state law, not federal law. *Rea* v. *United States*, 1955, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233.

Assuming, but without deciding, that the order of the court in the district of seizure is "binding", it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evidence. The parties are bound, as they are to any rule of the case, subject to further orders of the Court. The trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he would decide that exceptional circumstances require the admission of the evidence. Certainly, the order is not binding in the sense that it can transform an otherwise interlocutory order into a final order. And, an order to suppress has

no finality because it does not of itself terminate the criminal proceedings.[11]

[fol. 324] The Government's real objection here is that it will not have another opportunity to obtain review. That would be so even if the order were made by a district judge in the district of trial. *United States* v. *Wheeler*, 3 Cir., 1960, 275 F.2d 94; *United States* v. *Jennings*, (D.C. D.C. 1956) 19 F.R.D. 311, aff'd, D.C. Cir., 1957, 247 F.2d 784. Carroll answers this argument:

> "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactory reviewable. In particular is this true of the Government in a criminal case. . . ."

If the Government is to be given an opportunity to appeal a suppression order in criminal cases, Congress should give it.[12]

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[11] In United States v. Ashby, 5 Cir., 1957, 247 F.2d 684, an order to suppress evidence effectually terminated the proceeding since the district court considered the indictment invalid as based on tainted evidence. This Court allowed an appeal in the course of which it was necessary to review the suppression order inseparably connected with the dismissal. But the appeal was from the dismissal of the indictment. In a similar case, United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873, the court stated that it was not allowing a roundabout appeal from a nonreviewable interlocutory order. The question of the validity of the indictment obtained as a result of presentation to the grand jury of evidence unlawfully acquired would not necessarily entail consideration of the different question of whether the evidence involved was subject to a suppression order.

[12] "If there is serious need for appeals by the Government from suppression orders, or unfairness to the interests of effective criminal law enforcement in the distinctions we have referred to, it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Carroll v. United States, 1957, 354 U.S. 394, 407, 77 S.Ct. 1332, 1 L.Ed. 2d 1442.

In 1956 Congress took the affirmative step of allowing the Government to appeal pre-trial suppression orders in narcotics cases; in such cases a large part of the Government's evidence is obtained by seizure after arrest. 18 U.S.C.A. § 1404 (1958). A recent "Report of the Committee on the Judiciary, United

[fol. 325] This Court has no jurisdiction to hear the appeal from the order of suppression. The appeal is accordingly

DISMISSED.

States Senate, containing a Summary of the Findings and Recommendations of the Subcommittee on Improvements in the Federal Criminal Code" (S.R. Rep. No. 1478, 85 Cong., 2nd Sess., at p. 14) stated: "[S]uch appellate rights should not be restricted solely to narcotics cases. With stringent Federal rules governing searches and seizures, the absence of a statutory right of the Government to appeal from preliminary orders suppressing the evidence in other criminal cases is a serious handicap to Federal law enforcement authorities. . . . Ironically, the ultimate question of whether the district judge was right initially in suppressing the evidence cannot be determined, because the Government lack the right to appeal this preliminary ruling. . . . It is obvious that with 94 United States district courts, with 330 district judges, each having its own views as to what constitutes an illegal search, there never will be achieved any degree of uniformity in the Federal law until the Government is granted the right to appeal. Even judges within the same district are not in agreement as to what constitutes an unreasonable search. Where a search will be approved by one, it will be suppressed by another."

[fol. 326]

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No. 18355

UNITED STATES OF AMERICA

versus

DANIEL J. KOENIG

JUDGMENT—April 12, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby dismissed.

[fol. 327] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 328]

SUPREME COURT OF THE UNITED STATES

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ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 21 which case is also transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

★ U. S. GOVERNMENT PRINTING OFFICE 1961 017317 519